ORAL ARGUMENT SCHEDULED FOR MAY 6, 2019

Nos. 18-1244 & 18-1155

In the United States Court of Appeals for the District of Columbia Circuit

INGREDION INCORPORATED D/B/A PENFORD PRODUCTS CO.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

LOCAL 100G, BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO, CLC,
Intervenor.

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Case Nos. NLRB-18-CA-160654 and NLRB-18-CA-170682

PETITIONER'S FINAL OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the petitioner hereby certifies as follows:

1. **Parties and Amici**. Ingredion Incorporated d/b/a Penford Products Co. is the petitioner in Case No. 18-1244 and cross-respondent in Case No. 18-1155. Ingredion was the respondent below. Ingredion is a publicly traded company. It has no parent company. No publicly traded company has a 10% or greater stock ownership interest in Ingredion. Ingredion is a leading global ingredients solutions provider for the food, beverage, paper and corrugating, brewing, and other industries.

The National Labor Relations Board is the cross-respondent in Case No. 18-1244 and the petitioner in Case No. 18-1155. Appearing as the charging party below and as an intervenor in both Case No. 18-1244 and Case No. 18-1155 is Local 100G, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC. No amici have appeared in this case.

2. **Rulings Under Review**. On August 26, 2016, Administrative Law Judge Mark Carissimi issued a decision in this matter. On May 1, 2018, a three-member panel of the NLRB (Pearce, McFerran, and Emanuel) issued its decision in this matter. The NLRB decision is reported at 366 NLRB No. 74. Finally, on August 16, 2018, the NLRB denied Ingredion's motion to reopen the record.

3. **Related cases**. This case has not been previously before this Court or another court.

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GLOSSARY

"Act" or "NLRA" — National Labor Relations Act, 29 U.S.C. §151, *et seq.*

"ALJ" — Administrative Law Judge.

"Board" or "NLRB" — Respondent/Cross-Petitioner the National Labor Relations Board.

"CBA" — Collective bargaining agreement.

"D.A." — Petitioner's Deferred Appendix filed March 19, 2019.

"General Counsel" — Counsel for the National Labor Relations Board.

"Ingredion" — Ingredion Incorporated d/b/a Penford Products Co.

"Union" — Local 100G, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC.

JURISDICTIONAL STATEMENT

The National Labor Relations Board had jurisdiction under 29 U.S.C. §160(a). On August 26, 2016, an administrative law judge issued a recommended order. On May 1, 2018, a three-member panel of the Board affirmed and adopted the ALJ's order with modifications. 366 N.L.R.B. No. 74.

This Court has jurisdiction under 29 U.S.C. §§160(e)-(f). On May 9, 2018, Ingredion filed an initial petition for review from the Board's May 1, 2018, decision. On May 17, Ingredion filed a motion to reopen the record, which the Board denied on August 16. Meanwhile, on June 4, the Board filed a cross-application for enforcement. On September 10, Ingredion filed a fresh petition for review of both the Board's May 1 decision and its August 16 order. At Ingredion's request, on October 5, the Court dismissed Ingredion's original petition for review and consolidated the Board's cross-application for enforcement with Ingredion's second petition for review.

STATEMENT OF ISSUES

1. Whether the Board improperly determined Ingredion violated the National Labor Relations Act by:

a. not bargaining to an overall impasse before Ingredion implemented its last, best, and final contract offer when the parties had held 25 separate bargaining sessions, many in the presence of a federal mediator, over 13 separate days, during which the Union had withdrawn only one proposal;

b. engaging in direct dealing with bargaining-unit employees during two impromptu, informal conversations that took place during a plant tour nearly two months before contract negotiations began;

c. "denigrating" the Union when a member of management informally encouraged two colleagues not to retire until they saw Ingredion's proposals; and

d. delaying in responding to part of the Union's information requests when the Board determined Ingredion gave the Union a "substantial amount" of information.

2. Whether the Board improperly invoked its jurisdiction under section 10(b) of the NLRA and violated Ingredion's due process rights by allowing the General Counsel to amend the Board's complaint on the eve of and during trial.

3. Whether the Board improperly ordered Ingredion's chief labor negotiator, who is now retired, to read a remedial notice to bargaining-unit employees, or to be present when a Board agent reads the notice.

PERTINENT STATUTES

Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. §158(a).

Section 158. Unfair labor practices

(a) Unfair labor practices by employer
It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10(b) of the NLRA, 29 U.S.C. §160(b).

Section 160. Prevention of unfair labor practices

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable
Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with

the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

STATEMENT OF THE CASE

I. Background

In this labor dispute, the Board's General Counsel and BCTGM Local 100G, affiliated with the Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, AFL-CIO, have alleged Ingredion violated sections 8(a)(1) and (5) of the Act before, during, and after the parties engaged in collective bargaining in mid-2015.

BCTGM Local 100G is the union at Ingredion's facility in Cedar Rapids, Iowa. The facility turns corn into agricultural byproducts that are used to make things such as food and ethanol. D.A.2047 (Tr. 767-68). Approximately 230 employees work at the facility, of which approximately 165 are represented by the Union. D.A.2047 (Tr. 767-68).

In March 2015, Ingredion purchased the Cedar Rapids facility from Penford Corporation. D.A.2054 (Tr. 931). At the time, Ingredion operated nine other U.S. plants, five of which were unionized. D.A.2054 (Tr. 931).

The collective bargaining agreement at the facility, which employees commonly called the "Red Book," was last substantively bargained in 2004, and since then had been extended several times. D.A.1963, 2023 (Tr. 74, 557); D.A.424-517. The last extension was set to expire on August 1, 2015. D.A.2191.

On May 11, 2015, as required by the Red Book, Ken Meadows of Ingredion sent a letter to the Union stating Ingredion intended to reopen negotiations. D.A.2055

(Tr. 935); D.A.1773-75. Meadows would serve as Ingredion's lead negotiator and draft its bargaining proposals. D.A.2057 (Tr. 947).

Due in part to the fact that the Cedar Rapids facility was under new ownership, and because the Union was concerned about differences between the Red Book and other Ingredion CBAs, the Union enlisted the help of its International Union, and Jethro Head in particular, to bring experience to the bargaining committee. D.A.1986, 2023 (Tr. 391-92, 554-57). Head acted as one of the Union's two lead negotiators but did not testify at trial. D.A. 2191 & 2195-96 n.11. Chris Eby, who did testify at trial, participated in negotiations as the chair of the local bargaining committee. D.A.1989 (Tr. 403).

During the bargaining process, which took place over 25 different sessions, across 13 days, from June to September 2015, the parties disagreed over almost everything, including the very form proposals should take. *See* D.A.2195-2202. On August 18, 2015, after the Union signaled it might strike, requested a final offer (which membership voted down), and refused to make further offers that addressed Ingredion's positions, Ingredion declared an impasse. D.A.2200-02; D.A.2064 (Tr. 978). When still more talks proved unproductive, Ingredion implemented its last, best, and final offer on September 14, 2015. D.A.2202.

II. Procedural history

On September 24, 2015, the Union filed a charge (later amended) against Ingredion alleging violations of the Act. D.A.1630-31. On January 28, 2016, the Board issued a complaint, which was also amended. D.A.1632-44.

On February 29, 2016, the Union filed a second charge alleging additional violations. D.A.1650. The Board in turn consolidated the two cases, along with its complaint, which was further amended just before trial. D.A.1651-54, 1658-62. During trial, the General Counsel introduced a consolidated complaint that represented the totality of the various charges against Ingredion, some of which it withdrew. D.A.1663-74; D.A.2034 (Tr. 692-93). Ingredion denied all charges against it. D.A.1645-49, 1655-57; D.A.1955 (Tr. 10-12).

Trial took place before an administrative law judge in April 2016. On August 26, 2016, the ALJ issued an order finding for the General Counsel on most claims. On May 1, 2018, a three-member panel adopted the ALJ's order, although it chose "not to pass on" certain of the ALJ's findings. Specifically, the Board found Ingredion (1) had not bargained to impasse, (2) engaged in direct dealing with unionized employees, (3) denigrated the Union, and (4) delayed in providing certain information to the Union. The Board also implicitly adopted the ALJ's conclusion that Ingredion's due process and statutory rights were not violated by allowing the General Counsel to amend its complaint just before and at trial. Finally, as a "remedy" for Ingredion's alleged viola-

tions, the Board directed Meadows, who is now retired, to read a notice to employees, or be present when the notice is read.

SUMMARY OF ARGUMENT

1. The evidence establishes Ingredion bargained in good faith and did not declare impasse until it became clear additional negotiations would be futile. The parties disagreed from the start over whether they should bargain from the existing contract (as the Union advocated) or whether they should start afresh (as Ingredion advocated), so as to align the Cedar Rapids agreement with Ingredion's CBAs at its other facilities. Neither party budged on this fundamental issue.

While Ingredion budged on the substantive terms of the agreement, to the point that it had to bargain against itself, the only proposal the Union ever relented on was its demand for herbal tea and stirrer sticks.

The parties both recognized they were at impasse when Ingredion had nothing left to give the Union, and the Union still refused to give on working from the Red Book. By then, Ingredion had brought in a federal mediator, and the Union had requested a final offer, voted down that offer, and mentioned the possibility of a strike. Still, Ingredion persisted for nearly another month, but the Union continued to insist on the very issue that had caused the deadlock—that the parties bargain from the Red Book. When Ingredion saw the Union's bargaining position would not change on this fundamental issue, it implemented the terms of its last, best, and final offer, as the law allowed it to do.

2. Nor is the Board's finding that Ingredion engaged in direct dealing supported by substantial evidence. The only allegation of direct dealing that both the ALJ and Board expressly agreed on stemmed from Meadows's tour of the plant nearly two months before negotiations began. Informal, unplanned, and general discussions, like the ones that took place on Meadows's plant tour, did not coercively interfere with the Union's bargaining role. The discussions occurred as part of Meadows's established practice of visiting newly acquired plants, and there is no allegation that Meadows intended to undermine or actually undermined the Union.

3. The ALJ and Board likewise expressly agreed on only one finding of unlawful statements in violation of section 8(a)(1): manager David Roseberry's statements that purportedly "denigrated" the Union. This claim stems from Roseberry's suggestion to two colleagues they wait to retire until they saw Ingredion's proposal on retirement benefits. But an employer is free to communicate to employees its views about unions so long as the communications do not contain a "threat of reprisal or force or promise of benefit." Roseberry's conduct does not meet this standard.

4. Substantial evidence also does not support the Board's finding Ingredion violated section 8(a)(5) by delaying in providing information regarding three topics. Ingredion made a reasonable effort to answer the Union's information requests promptly, producing a substantial amount of information in the process. Third parties, not Ingredion, possessed information about the topics at issue, and although it would be expensive and time-consuming for Ingredion to acquire the information, Ingredion

requested the information and notified the Union it would be several months before the third parties responded.

5. The Board also violated Ingredion's due process rights by considering a complaint amendment made days before trial and arguments the General Counsel made mid-trial.

6. Last, the Board's remedy requiring now-retired Ingredion employee Meadows, or a Board agent in Meadows's presence, to read a notice to employees is improper, since Ingredion has not engaged in egregious conduct necessary to justify this rarely-used remedy.

STANDING

Ingredion—the respondent in the proceedings before the Board and a party aggrieved by the orders under review—has standing.

ARGUMENT

This Court must affirm Board findings if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. §160(e). Though the Court's review of Board decisions is "highly deferential," it bears the "responsibility to examine carefully both the Board's findings and its reasoning." *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012) (citations omitted).

I. The Board's finding that Ingredion failed to bargain to a lawful impasse is not supported by substantial evidence.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. §158(a)(5). The bargaining obligation is suspended temporarily when the parties reach a lawful impasse. *Erie Brush*, 700 F.3d at 20.

A lawful impasse exists if the parties "are warranted in assuming that further bargaining would be futile." *Id.* (quoting *TruServ Corp. v. NLRB,* 254 F.3d 1105, 1114 (D.C. Cir. 2001)). An impasse thus is created when an employer bargains in good faith, "remains firm . . . as to one or more essential issues," "credibly declares a last offer in the negotiations," and the union fails to agree to the offer. *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 323-24 (D.C. Cir. 2015) (emphasis and footnote omitted). Good-faith bargaining "simply means a desire to reach an agreement," and does not preclude an employer from "insist[ing] on certain terms." *Id.*

The Board considers several factors in determining whether a valid impasse existed, including (1) the parties' bargaining history, (2) the parties' good faith in negotiations, (3) the length of the negotiations, (4) the importance of the issue or issues as to which there is disagreement, and (5) the parties' contemporaneous understanding as to the state of negotiations. *Taft Broad. Co.,* 163 N.L.R.B. 475, 478 (1967), *enforced sub nom. Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *accord Erie Brush*, 700 F.3d at 21.

I.A. Ingredion bargained to a lawful impasse.

Here, the evidence demonstrates Ingredion bargained to a lawful impasse.

The parties negotiated from June through mid-September 2015 with a federal mediator present—at Ingredion's request—during much of their joint sessions. At no point did either party propose a compromise on the framework for their negotiations. The Union wanted to bargain from the Red Book, and Ingredion wanted to negotiate from a template consistent with agreements at its other facilities. Ingredion sincerely tried to reach an agreement, and even negotiated against itself. What's more, both parties understood bargaining to be at an impasse before Ingredion implemented its last offer. Ingredion maintained throughout that it would not negotiate from the Red Book, no one questioned the importance of the form of the agreement, and Ingredion's last offer was consistent with and followed from its final offer. That should have been more than enough for the Board, and it is more than enough now, to find Ingredion bargained in good faith to a valid impasse.

I.A.1. Any measure of the parties' course of bargaining shows Ingredion negotiated to a valid impasse in good faith.

Because they overlap in several respects, Ingredion takes the first three *Taft* factors together. By any measure, there is substantial evidence Ingredion bargained to impasse in good faith.

I.A.1.a. The quantity of bargaining sessions shows Ingredion negotiated in good faith.

Undisputed record evidence about the sheer quantity of negotiations shows Ingredion bargained in good faith, declaring impasse only after numerous unproductive negotiating sessions.

The parties met 10 times from their first bargaining session (June 1) until Ingredion declared impasse (August 18), and another three times before Ingredion implemented its last offer (September 14). D.A.2214. In all, there were 25 bargaining sessions. *See* D.A.1625-28, 1878-1953; D.A.2059-86 (Tr. 955-1063).

Contrary to the ALJ's conclusion that there was a "relatively low" number of sessions, D.A.2214-15, evidence of over a dozen sessions counsels *in favor* of a finding of lawful impasse, not against it. *See*, *e.g.*, *Laurel Bay Health & Rehab. Ctr. v. NLRB*, 666 F.3d 1365, 1368 (D.C. Cir. 2012) (impasse found where parties held eight sessions); *Erie Brush*, 700 F.3d at 19 (similar); *CalMat Co.*, 331 N.L.R.B. 1084, 1099 (2000) (10 sessions); *Concrete Pipe & Prods. Corp.*, 305 N.L.R.B. 152, 153, 156 (1991), *aff'd sub nom. United Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 245-46 (D.C. Cir. 1993) (four).

Between June and August 2015, moreover, Ingredion asked the Union to bargain *even more*, and it was *the Union*, not Ingredion, that called many sessions to an end, even when Ingredion asked to continue. *See* D.A.2061, 2072, 2074, 2076, 2082, 2096 (Tr. 964, 1007-08, 1017, 1024, 1049-50, 1117); D.A.1898, 1909, 1911. Ingredion never cancelled

a bargaining meeting, but the Union did. D.A. 2026, 2087-88 (Tr. 578, 1070-71); D.A.1822.

That the Union *asked* Ingredion for a final offer on July 31, which it put up for a vote the next day, D.A.2077-78 (Tr. 1029-32); D.A.2200, indicated that "a substantial degree of firmness in positions had been reached." *Mission Mfg. Co.*, 128 N.L.R.B. 275, 287 (1960). Ingredion can hardly be faulted for participating in a "relatively low" number of sessions when the Union itself signaled discussions were at a dead-end.

If all that weren't enough, after an impasse was declared on August 18, Ingredion continued to bargain into mid-September before implementing its last offer. D.A.2202. The Board construed these negotiations as evidence that impasse was not lawfully declared, D.A.2186, but "the Board cannot rely on a party's 'post-impasse conduct' to find no impasse." *Erie Brush*, 700 F.3d at 22. Ingredion's declaring impasse "did not preclude the parties from continuing to bargain," for bargaining may continue despite deadlock. *CalMat*, 331 N.L.R.B. at 1099 n.60.

I.A.1.b. The quality of bargaining sessions shows Ingredion negotiated in good faith.

The bargaining sessions' quality—in breadth and depth of topics addressed—also shows Ingredion bargained in good faith.

Ingredion's willingness to address and respond to the Union shows its earnest desire to reach agreement. *See TruServ*, 254 F.3d at 1110-11. Ingredion addressed many topics of concern to the Union in its numerous proposals, including: overtime and

vacation, wages, holiday pay, jury-service, family-and-medical leave, insurance, discipline, seniority classifications, plant rules, and work stoppages. By the time it implemented its final offer, and in direct response to the Union's bargaining demands, Ingredion had made some *46 changes* to its proposals. *See* D.A.48, 58-59 (Jt.Ex. 2); D.A.92-93, 95, 99, 103-05, 110 (Jt.Ex. 3); D.A.131-35, 137, 140, 145-46 (Jt.Ex. 4); D.A.160, 165-69, 178 (Jt.Ex. 5); D.A.226, 228, 232 (Jt.Ex. 6); D.A.244, 258-60, 266 (Jt.Ex. 7); D.A.274, 276, 279-80, 286-87, 296, 299, 306-07 (Jt.Ex. 8); D.A.310 (Jt.Ex. 9); D.A.2064, 2077-81, 2089-90, 2095 (Tr. 975-76, 1030-34, 1037-43, 1076-82, 1111-12). Ingredion also made adjustments to address, among other things, the 21 items the Union raised as part of an information request. *See* D.A.2072-74, 2076-81 (Tr. 1009-16, 1023-26, 1030-31, 1037-43); *see generally* D.A.312-14, 319-20, 441, 450, 454, 457, 461, 468, 561-62, 1827-30. This is "the kind of good-faith, hard bargaining that characterizes impasse." *TruServ*, 254 F.3d at 1116.

In contrast, by its own admission the Union relented on only *one* proposal by withdrawing its request for herbal tea and stirrer sticks. D.A.2024-25, 2081 (Tr. 560-64, 1043). That's right—tea and sticks. And the Union willingly adopted only about four of Ingredion's proposals. D.A.2024-25, 2081 (Tr. 560-64, 1043).

There can be no serious dispute Ingredion's last offer contained a host of provisions beneficial for employees, including substantial wage increases and a vacation pay-out that created a windfall for many employees. *See* D.A.272-310. The quality of

these provisions, and the lengths to which Ingredion went to meet the Union on these topics where it could, show Ingredion's good faith.

I.A.1.c. Ingredion's level of engagement shows it negotiated in good faith.

Ingredion's level of engagement during bargaining further establishes its good-faith bargaining.

Ingredion's request that a federal mediator attend bargaining sessions undermines any finding that it was "going through the motions." *APT Med. Transp., Inc.*, 333 N.L.R.B. 760, 767 (2001). As a result of Ingredion's request, a mediator participated in several sessions, ultimately (though not initially) with the Union's consent. D.A.1627, ¶5; D.A.1819, 2196-98; D.A.2065 (Tr. 979-80). That a mediator was called in, and that the Union consented to it, indicates "bargaining had reached a . . . bedrock area." *Mission Mfg. Co.*, 128 N.L.R.B. at 287.

Also "[i]ndicative of [Ingredion's] good faith was its willingness to consider" and respond to the Union's proposals, and its "willingness to explain and, if necessary, modify its own proposals." *Frontier Dodge*, 272 N.L.R.B. 722, 730 (1984). Meadows evaluated and responded to the Union's proposals throughout bargaining: **June 1**, D.A.2195 (Order 10); D.A.2059-60 (Tr. 958-59); D.A.313-15, 1676, 1880; **June 29**, D.A.2196 (Order 11); D.A.1975, 1992, 2062-63 (Tr. 261, 415-16, 969-72); D.A.1678, 1752, 1841, 1882; **July 28**, D.A.2197-98 (Order 12-13); D.A.2069 (Tr. 996-98); D.A.570, ¶15; D.A.1684-87, 1849-51, 1894-97; **July 29**, D.A.2198-99 (Order 13-14);

D.A.1978, 2072-74 (Tr. 291-92, 1010, 1012-16); D.A.1688-92, 1899-1906; **July 31**, D.A.2199-2200 (Order 14-15); D.A.2010, 2078, 2089 (Tr. 486, 1031-32, 1076-77); D.A.1915; **August 18**, D.A.2201-02 (Order 16-17); D.A.2013-14, 2081-82, 2095-96 (Tr. 501-02, 1044-47, 1114-15); D.A.1863, 1925-29; and **September 10**, D.A.2202 (Order 17); D.A.2083, 2097 (Tr. 1052, 1119).

Indeed, Meadows went to great lengths to explain Ingredion's proposals and its rationales for them: **June 1**, D.A.2059-61, 2088-89, 1991 (Tr. 956-64, 1074-75, 411-12); D.A.1677, 1879-81; D.A.2-38 (Jt.Ex. 1); **June 30**, D.A.1994, 2064 (Tr. 424-25, 975-76); D.A.1843, 1885; D.A.40-76 (Jt.Ex. 2); **July 28**, D.A.2197-98 (Order 12-13); D.A.1977, 1996, 2067-69 (Tr. 289-90, 433, 988-91, 997-98); D.A.1825, 1849, 1890, 1897; D.A.79-115 (Jt.Ex.3); **July 29**, D.A.2198-99 (Order 13-14); D.A.2072-73 (Tr. 1009-13); D.A.1688, 1899-1900; D.A.118-54 (Jt.Ex. 4); **July 30**, D.A.2076 (Tr. 1023-24); D.A.157-93 (Jt.Ex. 5); **July 31**, D.A.2076-78, 2089-90 (Tr. 1026-27, 1029-31, 1077, 1081-82); D.A.1914-15; D.A.196-232 (Jt.Ex. 6); and **August 18**, D.A.2080-81, 2093-94, 2012-13 (Tr. 1039-43, 1105-12, 496-98); D.A.1697-99, 1920-21.

Compared with Ingredion's numerous proposals and responses, the Union made but three proposals before impasse was declared and didn't make a wage proposal until August 18, the day impasse was declared. D.A.312-16, 323, 1627 (¶7), 1777-80; *see* D.A.1982-83 (Tr. 356-57, 371). The Union at times made no effort to explain its proposals. *E.g.*, D.A.2077, 2083 (Tr. 1029, 1053). When compared to this behavior, Ingredion's bargaining can only be called good faith.

I.A.1.d. Ingredion's pre-bargaining conduct is consistent with its history of bargaining in good faith.

Also suggestive of its good faith is Ingredion's pre-bargaining history. After acquiring the Cedar Rapids facility, but before bargaining began, Ingredion made clear it was not anti-Union by continuing to recognize the Union, holding labor relations meetings, and honoring the Red Book. *See* D.A.1963, 1971, 2054-55 (Tr. 74, 173, 931-36); D.A.1810.

Meadows is an experienced negotiator who understands the obligation to deal with unions in good faith. D.A.2057 (Tr. 947-48). In fact, before this case, in negotiating over 50 separate CBAs, Meadows had never been found to have bargained in bad faith. D.A.2057 (Tr. 947-48).

I.A.1.e. The level of respect Ingredion accorded to the Union shows it bargained in good faith.

Another example of Ingredion's good-faith bargaining is the respect Meadows accorded the Union.

As Ingredion's chief negotiator, Meadows testified at trial, opening himself up to cross-examination. Meadows established that he dealt with the Union in a collaborative and respectful way, communicating forthrightly Ingredion's interests and asking the Union to do the same. *See* D.A.2059-60, 2088-89 (Tr. 956-57, 959-60, 1073-76); D.A.1774-75, 1817; 1834, 1879. He expressed to the Union his intention of reaching a contract. D.A.2059 (Tr. 956); D.A.1676, 1750-51, 1834, 1848, 1879. He tried to steer the parties toward substantive bargaining. D.A.2061, 2064, 2066-67, 2074, 2081, 2083,

2096 (Tr. 964-65, 977, 986-87, 1017, 1045, 1051, 1115); D.A.1848-49, 1863, 1865-66, 1909, 1924-25, 1928-30. He never threatened impasse, D.A.2061 (Tr. 965); D.A.1880; sought to impose deadlines on negotiations, D.A.1995, 2064 (Tr. 427, 977); D.A.1753, 1886; or personally attacked Union representatives, D.A.2069A, 2072, 2079 (Tr. 999, 1008, 1035). And even after bargaining became heated, Meadows discussed the issues with a conciliatory tone. *See* D.A.1977, 2002, 2069A (Tr. 288-89, 455, 999).

In contrast, Head, the Union's lead negotiator, did not testify, and there was no explanation for his absence. *See* D.A.2191, 2195-96 & n.11. The General Counsel's failure to call Head, a witness disposed to the Union, raised "an adverse inference . . . regarding any factual question on which [Head was] likely to have knowledge." *Mail Contractors of Am., Inc.*, 346 N.L.R.B. 164, 166 (2005).

The record confirms Head would not have been a favorable witness for the Union. Head called Meadows a "fucking idiot" at one point in negotiations, D.A.2001, 2069A (Tr. 454, 999), and threatened physical harm against Meadows, saying that if he were Eby (the local's negotiator), he would have come across the table and cut Meadows. D.A.2079 (Tr. 1035); D.A.1919. Although the ALJ and Board may have preferred to ignore this testimony, it went unrebutted by Head. "As the Supreme Court has explained, the Board 'is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.'" *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 437 (D.C. Cir. 2012) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB,* 522 U.S. 359, 378, (1998)). This is just one

example, among others Ingredion will mention later, where the ALJ treated the evidence with "an almost breathtaking lack of evenhandedness," completely disregarding the testimony of Ingredion's witnesses for the slightest of immaterial inconsistencies, while the union's witnesses survived even material contradictions. *Id.*

I.A.2. All agreed the form of the agreement was critical.

As to the fourth *Taft* factor, neither the ALJ nor the Board ever questioned the importance of the issues that divided the parties, including the form of the agreement. *Taft*, 163 N.L.R.B. at 478. The ALJ recognized the form of agreement was one of the "major" issues that led to the deadlock. *See* D.A.2214. Nor did the ALJ doubt that both sides remained firm throughout on this "major" issue. And for good reason: the evidence on this issue is extensive.

Consistent with his past practice, Meadows attempted to draft a proposal based on the Red Book, D.A.2057, 2091 (Tr. 949, 1085); D.A.1812-15, but ultimately concluded that presenting a proposal that merely revised the Red Book was not possible because its terms were fundamentally inconsistent with Ingredion's other CBAs and did not fit the operational needs for Cedar Rapids. D.A.2057-58, 2088 (Tr. 948-51, 1073-74). Ingredion sincerely believed it couldn't go back to the Red Book, and communicated this belief to the Union. *E.g.*, D.A. 1996, 2064, 2073, 2082 (Tr. 431-32, 977, 1014, 1049-50).

For its part, the Union was equally adamant that, to reach an agreement, the parties needed to bargain from the Red Book. *E.g.*, D.A.1981, 1984-85, 1994, 2017,

2060, 2063-64, 2066-68, 2073-75, 2078-79, 2081-82, 2084, 2097-97 (Tr. 353, 377-79, 425, 514, 961, 972-73, 976-77, 986-87, 991, 1014, 1017, 1019, 1034-36, 1044-49, 1056, 1118-19).

Nevertheless, without citing any evidence, the ALJ stated that "further discussion . . . may very well have resulted in the parties compromising with respect to the format and language of a new agreement." D.A.2214-15. There are two flaws with this finding: (1) it's rank speculation, and (2) the ALJ found Ingredion attempted to find common ground by moving off its initial proposals.

I.A.2.a. The ALJ's claim that additional bargaining may have led to an agreement is rank speculation.

The ALJ's finding that further discussion may have resulted in the parties compromising on the language, let alone "the format . . . of a new agreement," D.A.2215, was not based on evidence. Rather, the ALJ "relied on its intuitive belief that, upon further bargaining, each side would have made additional concessions." *Erie Brush*, 700 F.3d at 22-23 (quoting *TruServ*, 254 F.3d at 1116). "Such rank speculation cannot form the basis of a sound administrative finding." *Id.*

Elsewhere in its order, the ALJ noted that, after Union membership rejected Ingredion's penultimate offer, "the Union again indicated . . . that . . . for the bargaining process to move forward, [Ingredion] needed to make proposals based upon the format of the existing agreement." D.A.2212. The ALJ can't have it both ways; it can't find on the one hand that the Union continued to condition further negotiations on

bargaining from the Red Book, and on the other hand claim additional bargaining on substantive terms would have broken the deadlock, particularly when Ingredion was equally adamant that, for the negotiations to proceed, the Union "needed" to make proposals that were *not* based on the Red Book.

Ingredion needed only to be firm on one essential issue to create the conditions for a valid impasse. *See Mike-Sell's*, 807 F.3d at 324. To do so, it "must show that: first, a good-faith bargaining impasse actually existed; second, the single issue involved was critical; and third, 'the impasse on this critical issue led to a breakdown in the overall negotiations.'" *Erie Brush*, 700 F.3d at 21 (quoting *CalMat,* 331 N.L.R.B. at 1097).

Ingredion has already discussed the issue of good faith. The second and third factors are also satisfied; the ALJ described the format of the agreement as a "major" issue, and strongly implied the parties' disagreement on that issue ultimately led to the breakdown in negotiations. *See* D.A.2202, 2212-14. Even a Union witness said the form of agreement was an issue the parties simply couldn't agree upon. D.A.1984-85 (Tr. 378-79). Indeed, *all* evidence shows the parties, from the beginning, were "diametrically opposed" on the form of agreement, presenting "an insurmountable obstacle" to securing a new CBA. *Erie Brush*, 700 F.3d at 23 (citation omitted). Ingredion thus met its burden of showing the parties reached a valid impasse on at least one critical issue.

I.A.2.b. The ALJ's claim that Ingredion did not attempt to reach common ground on modifications to its initial proposal is not supported by the record.

The second problem with the ALJ's analysis of the fourth *Taft* factor is that Ingredion *did*, as already discussed and the ALJ recognized, "attempt[] to reach a common ground on modifications of the language contained in initial proposals." D.A.2214-15. The ALJ expressly noted Ingredion "made a series of concessions" that resulted in its last offer, which "contained some of the [Redbook's] terms," and included a wage increase. D.A.2210-11.

That the parties may have made some modest progress on certain issues but not others is irrelevant. *Taft Broad. Co.*, 163 N.L.R.B. at 478. "[A]n impasse is no less an impasse because the parties were closer to agreement than previously . . . ." *Id.*

I.A.3. Both sides understood they were at impasse.

The final *Taft* factor is the contemporaneous understanding of the parties as to the state of negotiations. 163 N.L.R.B. at 478. Ingredion understood the parties to be at an impasse by August 18, when it declared an impasse, and certainly no later than September 14, when it implemented its last offer. *See* D.A.2201-02 & n.22.

Even the *Union*'s conduct shows it understood the parties to be at impasse. Both of the Union's lead negotiators indicated by August 18 the parties hadn't reached even "one tentative agreement." D.A.2012, 2079-80 (Tr. 494, 1038-39). Meadows believed likewise and told Head as much. D.A.2080 (Tr. 1039). The parties were supposed to meet the next day, but Head refused. D.A.2082 (Tr. 1047); D.A.2201-02.

On September 9, after Meadows made clear he wouldn't work from the Red Book, Head said "we're done." D.A.2202; D.A.2082, 2096 (Tr. 1049-50, 1117). In response, Meadows said he would prepare Ingredion's last, best, and final and plan to implement the offer the following Monday absent real movement. D.A.2082 (Tr. 1050).

The next day there was more of the same. D.A.2082-83, 2096-97 (Tr. 1050-53, 1117-19). The Union gave Ingredion a proposal in the format of the old agreement; Meadows told the Union it was unacceptable, because it did not relate to the last offer on the table. D.A.2082-83, 2096-97 (Tr. 1050-53, 1117-19); D.A.2202. Nevertheless, Meadows said he would review it and get back to the Union later that night, and when the Union said they were done negotiating for the day, Meadows gave the Union a letter stating his intention to implement Ingredion's last offer on September 14. D.A.2082-83, 2096-97 (Tr. 1050-53, 1117-19).

Finally, on September 11, after again discussing their disagreement over bargaining from the Red Book, Head said, "You can lock us out, or we can strike. You do what you want to do." D.A.2084 (Tr. 1055-56); D.A.2202.

Under these circumstances, it's difficult to understand how the Union could *not* have understood the parties to be at impasse.

The ALJ came to a different conclusion, D.A.2215, but his rationale does not support a finding the parties' contemporaneous understanding was anything other than that they were at impasse.

I.A.4. Neither the Union's denial that the parties were at impasse nor its failure to meet Ingredion's position precluded impasse.

Although the Union denied the parties were at impasse, that cannot rebut the fact that a valid impasse existed. "[A]lthough it is often said by both the Board and courts that an impasse exists when *both* parties believe bargaining has reached a dead end, . . . '[a] contemporaneous understanding as to impasse does not . . . require the parties to reach mutual agreement as to the state of negotiations.'" *Mike-Sell's*, 807 F.3d at 323 (quoting *TruServ*, 254 F.3d at 1117). Likewise, "[a] union official's denial that an impasse exists, combined with a new negotiating proposal that does not meet the employer's position, does not rebut an impasse." *Id.* at 324.

What *is* required for a valid impasse is that the "employer maintain[] a firm position" and "ma[ke] clear that acceptance of its position on particular issues is essential to agreement." *Id.* With those conditions present, and they were here, "a union's last-minute movement, short of agreement, will not avoid an impasse." *Id.* At most, that's all there was: "last minute movement," movement that came well short of "meet[ing] [Ingredion's] position." *Id.* at 324.

The ALJ acknowledged as much. He found it important that on August 18 and September 10, the Union presented new proposals, but *both* were "in the format of the expired contract." D.A.2215. Head and Meadows stuck to their positions that their form of agreement was the only way forward. *Supra* section I.A.3.; D.A.2013-14,

2081-84, 2095-97 (Tr. 501-02, 1044-47, 1052-55, 1113-14, 1117-19); D.A.1868, 1933; D.A.340-423 (Jt.Ex. 15); *see also* D.A.2201-02 (Order 16-17).

Even if one concedes these proposals reflected a "willingness" to compromise on some issues, they did not suggest a compromise on the one "major" issue that caused the deadlock—the form of the agreement. The parties' firm positions, instead, indicated impasse. *TruServ*, 254 F.3d at 1117-18. "[T]he Union's self-serving statement . . . that the parties were not at impasse," and the ALJ's vacuous claim that the Union was "willing" to and made movement from its position, do not change that conclusion. *Id.*

I.B. The ALJ's finding that Ingredion did not bargain in good faith is not supported by substantial evidence.

Contrary to all this, the ALJ found Ingredion actually engaged in bad-faith bargaining. He did so in part based on certain comments Meadows supposedly made, "regressive" proposals Ingredion supposedly made, and Ingredion's supposed conduct away from the bargaining table. D.A.2203-11. Ingredion addresses these issues shortly. But before that, Ingredion focuses on what appears to have been the ALJ's overriding concern with Ingredion's conduct: that Ingredion did not want to bargain from the existing contract.

I.B.1. The ALJ improperly faulted Ingredion for not bargaining from the existing CBA.

One basis for the ALJ's finding of bad faith was that the format and the substantive terms of Ingredion's proposed collective-bargaining agreement "bore no re-

semblance" to the provisions of the existing contract. D.A.2209. The tenor of the ALJ's opinion is that Ingredion requested—illegitimately—to start anew, with a proposal that didn't track the existing contract. *E.g.*, D.A.2195 n.10, 2209-11, 2214.

This is a wholly improper "substantive evaluation of the parties' positions." *Mike-Sell's*, 807 F.3d at 323; *Wal-Lite Div. of U.S. Gypsum Co. v. NLRB*, 484 F.2d 108, 110-13 (8th Cir. 1973). That the ALJ *was* making a substantive evaluation of the parties' position is only confirmed by the fact that, as the ALJ noted, the Union was as adamant about the format of the agreement as Ingredion was—*and yet*, the ALJ found "the Union's position . . . is not indicative of bad faith." D.A.2212. The ALJ thus looked at the parties' positions, evaluated their merit, and picked a side, faulting Ingredion for its position while exonerating the Union for its. Both parties made concessions, *e.g.*, D.A.2210; *supra* Section I.A.1.; the difference is that one did so in the context of the Red Book (which the ALJ preferred) and one did so in the context of a "dramatically" new agreement (which the ALJ disliked). This is yet another example of the ALJ's "breathtaking lack of evenhandedness." *Sutter E. Bay Hosps.*, 687 F.3d at 437.

Ingredion cannot be penalized for "reject[ing] . . . terms which were in a previous contract." *NLRB v. Pac. Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978). In a factually analogous case, the Eighth Circuit declined to enforce a Board order finding that an employer had engaged in bad-faith bargaining by insisting on a new form of agreement. *Wal-Lite*, 484 F.2d at 110-11. Like Ingredion, the employer had recently purchased the facility and wanted a new contract due to "the economically wasteful

operation of the plant under the [old] contract." *Id.* The court held that "the mere fact that [a company] adamantly insists on a bargaining position or has not budged from its position on most issues cannot suffice to render it guilty of a refusal to bargain in good faith." *Id.*

Wal-Lite confirms that Ingredion had every right to take the position it did, especially when the Union did the opposite, as the parties remain in control of their negotiations, and each party, not the Board, determines at what point it ceases to be willing to compromise. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970); *United Steelworkers Local 14534*, 983 F.2d at 245. *NLRB v. McClatchy Newspapers,* 964 F.2d 1153, 1163 (D.C. Cir. 1992) (per curiam).

The ALJ and Board disregarded the basic principle that *both* parties were entitled to hold their respective positions on the form of agreement. For that reason alone, the order should not be enforced.

I.B.2. The ALJ improperly determined certain comments were evidence of bad faith.

The ALJ was equally wrong to treat "a number of comments" by Meadows as evidence Ingredion "would only reach an agreement on its own terms." D.A.2209. One such statement occurred before bargaining and is connected to the ALJ's findings on direct dealing, which is addressed in section II. Another statement occurred *after* Ingredion implemented its final offer. D.A.2209. But "the Board cannot rely on a party's 'post-impasse conduct' to find no impasse." *Erie Brush*, 700 F.3d at 22.

The *only* allegedly improper statement the ALJ cited that Meadows made *during* bargaining is that, on June 30, "Meadows told the Union that if the parties did not come to an agreement he could give the Union a last, best, and final offer . . . ." D.A.2209. This can't serve as evidence of bad faith. Elsewhere in its order, the ALJ noted that, "[i]n considering whether [a] statement constituted an unlawful threat in violation of Section 8(a)(1), [the Board has held] that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike." D.A.2192 & n.8. But it is equally well established that after bargaining in good faith and impasse is reached, the employer may implement "its final proposals on mandatory subjects of bargaining." *McClatchy Newspapers*, 964 F.2d at 1174 (Silberman, J., concurring). Logically, Ingredion should be allowed to notify the Union of its right to take such action.

Even assuming Meadows's comments could be *evidence* of bad faith, they are hardly dispositive of the question. Although some statements may show bad-faith bargaining, "the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining." *Logemann Bros. Co.*, 298 N.L.R.B. 1018, 1021 (1990) (internal quotation marks and citation omitted). Neither the ALJ nor the Board was "especially careful" in this case. The ALJ faulted Ingredion for every comment he didn't like, while ignoring entirely unrebutted evidence the Union's lead negotiator called Meadows a "fucking idiot," and the Union's not-so veiled threat to strike. *See* D.A.2001, 2064, 2069A (Tr. 454, 978, 999).

I.B.3. The ALJ improperly determined Ingredion's proposals were evidence of bad faith.

The ALJ also found Ingredion failed to provide a "legitimate" explanation justifying the differences between its "regressive" proposals and the provisions of the existing contract. D.A.2209-10. The Board has previously held, in a case the ALJ cited, that "[w]here the proponent of a regressive proposal fails to provide an explanation for it, or the reason appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining." *Mid-Continent Concrete*, 336 N.L.R.B. 258, 260 (2001). The *Mid-Continent Concrete* employer, however, "did not [even] *attempt* to justify its economic proposals." *Id.* (emphasis added).

By contrast, Ingredion explained from the get-go, D.A.2059, 2088-89 (Tr. 955-57, 1073-76), why it started with a new contract: (1) to align its Cedar Rapids contract with CBAs at other facilities; (2) the Red Book did not fit its plans for the facility; and (3) a new contract would allow Ingredion to grow, D.A.2195 n.10; *see also* D.A.2057 (Tr. 948-49).

What the ALJ disliked is *not* that Ingredion didn't attempt to provide an explanation—it did—but Meadows's failure to elaborate on *part* of his explanation: he did not detail how the new contract would allow Ingredion to grow. D.A.2210. Even assuming a more-elaborate explanation were required, and Ingredion is aware of no authority that it was, there was nothing "dubious" or "illegitimate" about Ingredion wanting to align its Cedar Rapid contract with other contracts, *see NLRB v. Hi-Tech Cable*

Corp., 128 F.3d 271, 276-77 (5th Cir. 1997) (refusing union proposal because the employer desires a company-wide policy is not evidence of bad faith), let alone with a desire to grow, *cf. Wal-Lite*, 484 F.2d at 111 (insisting on new form of contract designed to stem wasteful operations is not evidence of bad faith).

Regardless, "that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith." *Mgmt. & Training Corp.*, 366 N.L.R.B. No. 134, 2018 WL 3608308, at *5 (July 25, 2018) (internal quotation marks and citation omitted). The ALJ did not find Ingredion's proposals met this standard, and its bare assertion the proposals were "regressive" isn't enough to suggest they were offered in bad faith.

I.B.4. The ALJ improperly relied on conduct away from the bargaining table as evidence of bad faith.

The ALJ also found Ingredion engaged in conduct away from the bargaining table that demonstrated bad faith, namely, direct dealing and failure to produce information to the Union in a timely fashion. D.A.2209, 2211. The ALJ suggested these alleged violations, and others, precluded a finding of impasse. D.A.2211, 2213. The substance of these alleged violations is addressed below. If the Court agrees Ingredion did not violate the NLRA in the ways the Board found, that ends this part of the analysis.

Even assuming these findings stand, they do not prevent a finding of valid impasse. According to the ALJ, "the Board has . . . recognized that the commission of serious, unremedied unfair labor practices precludes a finding of a valid impasse." D.A.2213. That's not accurate. The very authorities the ALJ cited for this proposition require that the serious, unremedied practice *cause*, at least in part, the breakdown in negotiations. *See Royal Motor Sales*, 329 N.L.R.B. 760, 763-64 (1999) (employer directly dealt on "the very issue" that lead to impasse); *Noel Foods*, 315 N.L.R.B. 905, 911 (1994) (breakdown in negotiations "was the proximate result" of unremediated unfair labor practices).

The ALJ claimed Ingredion's conduct had a "direct nexus" to its bargaining position but cited nothing to support that claim. D.A.2211. And there is no evidence, let alone substantial evidence, that Ingredion's alleged independent violations caused talks to break down. Indeed, the only finding of improper direct dealing occurred on April 6, *two months* before bargaining began. For this reason, too, Ingredion's conduct away from the bargaining table is not evidence of bad faith.

I.C. Ingredion did not bargain to an impasse over a nonmandatory subject of bargaining.

The ALJ determined an additional basis for finding the parties had not reached a valid impasse was that Ingredion's implemented offer "contained" a nonmandatory subject of bargaining, namely, a provision permitting Ingredion to "consider 12-hour shifts by [employee] classification if at least 65% of the classification votes to go to a

12-hour shift." D.A.2215 (quoting in part Jt.Ex. 8, Art. XI, §1 (D.A.285)). The ALJ claimed this provision "provided no role to the Union in the process," in that it effectively allowed Ingredion to "deal directly" with employees on their work hours. D.A.2215. This analysis is incorrect at two different levels.

I.C.1. The shift provision did not strip the Union of its collective bargaining function.

Case law establishes that employers may not go to impasse over "permissive," nonmandatory bargaining subjects, such as whether they must deal with a union. *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1224 (D.C. Cir. 1990). An employer thus may not bargain to impasse over whether it may "negotiate directly" with employees on certain issues or the union's noninvolvement in reaching agreement on those issues. *Id.* at 1221-24; *Retlaw Broad. Co. v. NLRB*, 172 F.3d 660, 666-67 (9th Cir. 1999).

Because the shift provision did not relegate the Union to be a mere observer on the shift issue, the provision was a mandatory, not "permissive," subject of bargaining. The shift provision does not contemplate Ingredion "negotiating directly" with employees. It merely allowed employees to vote on whether they wanted Ingredion to implement 12-hour shifts. Even then, nothing required Ingredion to implement a change in shift length following a vote; a vote only required Ingredion to "consider" implementing a change in shift length, making the vote merely advisory, and thus in the nature of a management rights clause. Since the parties agreed on a "more flexible" approach regarding shift length, "the extent of union and management participation in

the administration of such matters is itself a condition of employment to be settled by bargaining." *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 409 (1952).

The shift provision also does not exclude the union from discussions on shifts. Indeed, the final agreement recognizes the Union as the employees' bargaining agent, including for purposes of bargaining over hours. D.A.274, Art. I, §2. Consistent with this role, maintenance employees consulted with the Union before voting and voted as a block to alter their shifts. D.A.1968-69, 2038-39 (Tr. 148-150, 713-15).

Nor does the shift provision preclude the Union from representing employees in disputes that may arise after a change in shift length is implemented. Under the terms of the implemented agreement, the Union retained the right to represent employees over differences as to the meaning and application of the agreement's provisions. D.A.277-79, Art. IV, §1. In fact, after maintenance employees voted to change the length of their shifts, the Union filed grievances over the manner in which Ingredion was handling overtime, and in response Ingredion altered its practices. D.A.1968-69, 2039-40, 2051-53 (Tr. 149-50, 717-18, 882-90).

I.C.2. Ingredion did not go to impasse "over" the shift provision.

Even if the shift provision was considered a permissive subject of bargaining, there's no evidence it contributed to the breakdown in negotiations. It was merely one of many provisions that, in the ALJ's own words, was "contained" in Ingredion's last offer. D.A.2215.

The rule is that an employer cannot bargain to impasse "*over*" a "permissive" proposal. *Toledo Typographical*, 907 F.2d at 1222 (emphasis added). The nonmandatory provision thus must "contribute[]" to the impasse in a "discernible way." *See ACF Indus., LLC*, 347 N.L.R.B. 1040, 1042 (2006); *see also NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) ("[G]ood faith does not license the employer to refuse to enter into agreements *on the ground that* they do not include some proposal which is not a mandatory subject of bargaining." (emphasis added)).

Neither the ALJ nor the Board cited any evidence Ingredion bargained to an impasse "over" the shift provision, such that it "contributed to" the impasse. Nothing even suggests the Union took issue with the provision during bargaining. For this reason, too, the record does not support the Board's finding of an invalid impasse.

I.D. The Board improperly relied on post-impasse conduct as evidence there was no lawful impasse.

As one last reason for finding the parties had not bargained to a lawful impasse, the Board relied on the "fact" that Meadows's own declaration of impasse on August 18 was "negated by his making a new proposal and by the parties' bargaining positions over the subsequent 4 weeks until [Ingredion] implemented its last offer." D.A.2186. But again, "the Board cannot rely on a party's 'post-impasse conduct' to find no impasse." *Erie Brush*, 700 F.3d at 22. Regardless, the Union's "denial that an impasse exists, combined with a new negotiating proposal that does not meet the employer's position, does not rebut an impasse." *Mike-Sell's*, 807 F.3d at 324.

To the extent the Board meant to suggest a valid impasse was *broken* after August 18, that finding is unsupported by the record, because there were no "changed circumstances sufficient to suggest future bargaining would be fruitful." *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 232-33 (D.C. Cir. 1996). Although Ingredion continued to bargain after calling impasse, it did so not because its position was no longer firm, but to fulfill its "bargaining obligations." *See id.* Unfortunately, after August 18, the Union only confirmed it would bargain from the Red Book and presented its proposals accordingly. *See supra* section I.B.1.; D.A.2202. Ingredion thus had every reason to believe future bargaining would be futile; even assuming the parties' back-and-forth during this time represented a softening of their positions on some issues, they remained hardened as to agreement format. There is no substantial evidence of "changed circumstances" that warrants finding impasse was broken. *E.g.*, *Laurel Bay*, 666 F.3d at 1375-76 ("no suggestion" parties would retreat from position on the fundamental issue); *Erie Brush*, 700 F.3d at 22 (similar).

II. The Board's finding that Ingredion engaged in direct dealing is not supported by substantial evidence.

An employer violates sections 8(a)(1) and (5) of the NLRA if it engages in coercive "direct dealing" with employees, thereby interfering with the union's role as the exclusive bargaining representative. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999). In determining whether an employer has engaged in *coercive* direct

dealing, courts consider such factors as (1) who initiates the communication; (2) the time, place, and manner of the communication; and (3) its level of generality. *See Delco-Remy Div., Gen. Motors Corp. v. NLRB*, 596 F.2d 1295, 1309-10 (5th Cir. 1979) (applying non-exhaustive list of eight "widely accepted criteria").

Of the numerous direct-dealing allegations in the complaint, only *one* was expressly found by *both* the ALJ and Board to violate the law: Meadows's responses to employee questions on an April 6, 2015, plant tour. D.A.2186 n.1. The other direct-dealing allegations were dismissed by the ALJ (*see, e.g.*, D.A.2204-05, 2207); found not to "materially affect" the Union's remedies, such that the Board found it "unnecessary to pass on" them (D.A.2186 n.1); or not addressed by the Board (namely, the ALJ's finding that Ingredion improperly allowed maintenance employees to vote on their schedules, D.A.2219). Because the Court may not review findings the Board itself found "unnecessary to pass on," *see Retail Store Emps. Local 1001 v. NLRB*, 627 F.2d 1133, 1136 n.13 (D.C. Cir. 1979) (en banc), *rev'd on other grounds*, 447 U.S. 607 (1980), or decide issues "left open by the agency," *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991), Ingredion focuses its analysis on the one finding of direct dealing that both the Board and ALJ agreed upon. *See also Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 725 (D.C. Cir. 1981) (remanding when Board "explicitly chose not to consider" issue).

II.A. Meadows merely responded to employee questions regarding topics they initiated during impromptu discussions that occurred during an informal facility tour.

Here are the facts as the ALJ found them. On April 6, 2015, Meadows, consistent with past practice, visited the Cedar Rapids facility for the first time to meet management and the local union committee, tour the plant, and see the ethanol department. D.A.2191, 2193. There is no evidence Meadows wanted to target any specific employees or plant locations so he could raise issues specific to those locations.

In the ethanol department, Meadows happened upon two employees. D.A. 2191, 2193. Meadows introduced himself, explained that he would be negotiating the contract for Ingredion, and asked generally what both men would be looking for in a contract. D.A. 2191, 2193. The *employees* then raised the specific topics the ALJ found to be related to the terms and conditions of employment. One employee asked whether Ingredion would continue "gap insurance." Meadows replied generally it "would be something [Ingredion] would be looking into." D.A. 2191, 2193.

Two other employees then came into the room and asked Meadows questions. Jeff Kuddes asked about a wage increase and vacation schedules for maintenance employees; Meadows replied that any wage increase would probably be less than Kuddes wanted and noted understaffing issues, dangers in a third shift, and issues with insurance and a "Cadillac tax." D.A. 2191, 2193. Kuddes also asked Meadows if he was going to have a job after August 1. Meadows assured him he would. D.A. 2191, 2193. Kuddes "then brought up" pay raises, to which Meadows responded he would be "looking into"

that issue. D.A. 2191, 2193. Kuddes also raised the issue of employees in his seniority level receiving more vacation. D.A. 2191, 2193.

Meadows continued the tour to where Bruce Bishop worked. D.A. 2191, 2193. Meadows introduced himself as Ingredion's negotiator, to which Bishop responded "you and I will . . . get this straightened out, and you'll be back on a plane to Chicago." D.A. 2191, 2193. Meadows generally asked Bishop what he would like to see in a contract, and then Bishop initiated discussion on specific topics. Bishop stated he was nearing retirement and was interested in pension, gap insurance, and a raise in his pension multiplier. D.A.2193-94. Out of respect and curiosity, Meadows asked Bishop if he was planning on retiring soon. D.A.2193-94. When Bishop said he'd like to have that option, Meadows truthfully stated that gap insurance would only be necessary if Bishop would be retiring in the near future. D.A.2193-94. Bishop determined continuing the impromptu exchange wasn't going to be "real friendly," so he walked away. D.A.2193-94.

Based on these facts, and even ignoring the more favorable inferences from testimony of Ingredion witnesses, the ALJ found, and the Board agreed, that Meadows engaged in direct dealing. D.A.2194, 2186 n.1.

The impromptu conversations Meadows had were not impermissible direct dealing. Employees, not Meadows, initiated much of what was discussed, and the conversations were brief and general. None of Meadows's statements was coercive or could otherwise be construed as "erod[ing] the Union's position as exclusive repre-

sentative." *Allied-Signal, Inc., Kan. City Div.*, 307 N.L.R.B. 752, 753 (1992). An employer does not engage in impermissible direct dealing simply by responding to employee questions with the level of generality and under similar circumstances that Meadows did. *Americare*, 164 F.3d at 877-78 (no direct dealing where employer "simply answers an employee's question about an outstanding proposal"); *Ga. Power Co. v. NLRB*, 427 F.3d 1354, 1360 (11th Cir. 2005) (no direct dealing even though employee "input" was to be used in formulating employer's bargaining position); *Delco-Remy*, 596 F.2d at 1309-11 (no direct dealing for "casual and friendly" exchange where employees responded "candid[ly]").

The Board's prior decisions also counsel against a direct-dealing finding. *See*, *e.g.*, *U.S. Ecology Corp.*, 331 N.L.R.B. 223, 226-27 (2000) (no direct dealing because employer "did not initiate these communications" and spoke the only truthful thing it could); *Mount Hope Trucking Co.*, 313 N.L.R.B. 262, 262-63 (1993) (no direct dealing where record was unclear as to who initiated conversation and contained no evidence that employer attempted to erode union's position).

Even on the employees' view, Meadows merely asked what they might want in upcoming negotiations. The *employees* then initiated discussions on particular issues, to which Meadows generally replied that he would "look into" them. The discussions occurred during a plant tour, hardly the place or time for targeting specific employees or attempting to undermine the Union, and were held at employees' workspaces where they were free to leave—as Bishop did. Finally, neither the Union nor the General

Counsel has ever claimed that input Meadows received would ever be presented to employees outside of the already-scheduled negotiations.

Despite these facts, the ALJ believed the timing of the discussions was significant, as they occurred two months before negotiations were to begin. D.A.2194. To be sure, that is one difference from *Americare* and other cases, but it is a difference only because Ingredion had just acquired the Cedar Rapids facility. Consistent with his undisputed past practice, Meadows toured the newly-acquired facility and met employees and the local union committee. D.A.2191. Neither the Union nor the General Counsel ever suggested Meadows strategically waited to tour the facility until just before negotiations so that he could undermine the Union's role.

The ALJ also thought the circumstances suggested direct dealing because the employees who encountered Meadows on the plant tour had never been approached about upcoming negotiations before. D.A.2193-94. But the plant was under different ownership before. The undisputed evidence is that it was always *Meadows's* "established past practice" to tour newly-acquired plants and solicit input from employees. D.A.2191; D.A.2056 (Tr. 944); *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001) (continuation of past practice does not violate the Act); *see Logemann Bros.*, 298 N.L.R.B. at 1019-20 (similar).

* * * * *

Nothing Meadows said on the tour eroded the Union's status. The Board's finding of direct dealing therefore should not be enforced.

II.B. Ingredion did not engage in direct dealing by allowing mechanics to vote on their work schedules.

There was one ALJ finding of direct dealing the Board never addressed: that Ingredion "allow[ed] maintenance employees to vote on their schedule without the involvement of the Union." D.A.2219. Because the Board did not expressly rest its decision on the allegation, it is not subject to review. *See supra* section II., intro.

Even if it were subject to court review, the Board made an implicit change from the ALJ's order that, if anything, shows it did *not* affirm the finding of direct dealing on this issue. The ALJ ordered Ingredion to stop dealing directly with employees, specifically "including permitting employees to vote regarding a change of the schedule in the maintenance department." D.A.2220. The Board, however, ordered Ingredion to refrain from direct dealing without the "including" clause, and affirmed the ALJ's ruling "as modified." D.A.2186-87. Because the Board modified the ALJ's order to remove language about preventing votes on changes in the maintenance department schedule, it cannot be read to support a direct-dealing violation.

But even assuming the Board's order could be read to affirm the ALJ's order on this point, allowing maintenance employees to vote on their schedule is not coercive direct dealing. For Ingredion's last offer expressly *permitted* them to vote on their schedules, *see* D.A.285, Art. XI, §1; D.A.2051-52 (Tr. 881, 883), and implementing a provision in a last offer cannot lead to a direct-dealing violation, *see Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005).

III. The Board's finding that Ingredion denigrated the Union is not supported by substantial evidence.

As with direct dealing, the Board affirmed the ALJ's finding of only one alleged misrepresentation by Ingredion that violated section 8(a)(1), deciding that it was "unnecessary to pass on" others. D.A.2186 n.1. But Roseberry's encouraging two colleagues not to retire until Ingredion made its proposal did not "denigrate" the Union.

III.A. Roseberry did not denigrate the Union by encouraging two colleagues to wait to retire until negotiations began.

The only record evidence on this issue is that in July 2015, Roseberry told Michael Sarchett and Jeff King, two union stewards, not to sign retirement papers. D.A.2205. Roseberry informed Sarchett that a better contract was coming and not to "let a few people in the union body sway what you want to do." He told King to contact the Union's executive board and ask them to negotiate, saying Ingredion's "pension is negotiable, the hours, wages are negotiable, everything is negotiable." D.A.2205. King asked whether he should call the board's vice president, and Roseberry replied "yes." D.A.2205.

Shortly thereafter, King and Sarchett spoke briefly. King inferred from the conversation the Union was not telling employees everything, that Ingredion "has a lot to give," and the parties needed to negotiate. D.A.2205.

Based on this evidence, the ALJ found Roseberry attempted to "denigrate the Union in the eyes of employees" by indicating (1) Ingredion "was willing to offer a better contract," but (2) "the Union was unwilling to negotiate." D.A.2205-06.

Neither part of Roseberry's statement violates section 8(a)(1). That Ingredion was "willing to offer a better contract" than its prior proposals says nothing about the Union, and thus cannot "denigrate" it. At most, Roseberry's statement is a non-actionable statement of opinion, not a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (citation omitted); *Children's Ctr. for Behavioral Dev.*, 347 N.L.R.B. 35, 35-36 (2006).

As to the second part of Roseberry's statement—that the Union was "unwilling to negotiate"—the General Counsel never pleaded such a statement. The only allegation in the complaint is that Roseberry "misrepresent[ed] to employees the position [that *Ingredion*, not the Union] was taking at the bargaining table." D.A.1667, ¶5(c). Because this statement was not pleaded, it cannot support a section 8(a)(1) violation. *See Lammert Indus.*, 229 N.L.R.B. 895, 922 (1977).

Regardless, the statement is unsupported. Even the *employees'* testimony does not support Roseberry ever saying the Union was "unwilling to negotiate." The only evidence that could possibly support that statement is inference from hearsay: when King entered the maintenance room, he overheard Sarchett's recounting of his meeting with Roseberry, and *inferred* that Sarchett thought Roseberry explained that "the Union is not telling us everything, that [Ingredion] has got a lot to give us, that we need to get together and negotiate." D.A.2045 (Tr. 741). But Sarchett's own testimony does not support such a statement. Sarchett recalled Roseberry saying *only* "[d]on't let a few people on your union body sway you to what you want to do," D.A.2042 (Tr. 727), that there's a "better

contract coming," and "do not sign that," D.A.2041 (Tr. 724-25). Importantly, *Sarchett* testified he remembered "everything that was said," D.A.2043 (Tr. 730), testimony the ALJ credited. Because Sarchett did not testify about any statement the Union was "unwilling to negotiate," the record simply doesn't support such a conclusion.

Thus, even if Roseberry said the Union was "unwilling to negotiate," that cannot violate section 8(a)(1) since it's not coercive—it "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c); *see also Gissel Packing*, 395 U.S. at 618.

III.B. This Court may not consider statements by David Vislisel, both because the Board never considered them, and because they were not closely related to claims in the General Counsel's first amended charge.

The ALJ found another false or coercive statement allegedly made by David Vislisel violated section 8(a)(1). D.A.2206. But the Board never addressed it, so it cannot support a section 8(a)(1) violation. *See supra* section II., intro.

The Board, moreover, did not have jurisdiction over the allegation against Vislisel, because the allegation was not "closely related" to the claims in the first amended charge. *Precision Concrete v. NLRB*, 334 F.3d 88, 91-92 (D.C. Cir. 2003); *see* 29 U.S.C. §160(b). The General Counsel alleged for the first time in its April 16, 2016 amendment to the complaint that Vislisel violated section 8(a)(1) in July 2015 when he told employees they would never return to work if they went on strike. *Compare* D.A.1659-60, *with* D.A.1632-44, 1651-54. That allegation and those in the first amended charge, however, share no material similarities. Noting two incidents "involve types of

threatening conduct," like the ALJ did here, D.A.2190; D.A.1631, isn't enough to establish they are "closely related." *Precision Concrete*, 334 F.3d at 92-93. Nor does it matter that the Vislisel allegation occurred during the same negotiation process as the charged allegations. *E.g.*, *id.*; *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 281-82 (D.C. Cir. 1988).

What does matter is the threat Vislisel purportedly made was of a different type than those in the first amended charge. Unlike the allegation regarding threats in the first amended charge, the allegation against Vislisel said nothing about conditioning ongoing employment with employees' acceptance of Ingredion's terms. *See* D.A.1631, 1659-62; D.A.2206 (Order 21). The differences between the allegations required Ingredion to offer different defenses, witnesses, and evidence than those it provided for other charges. *See Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017, 1021 (D.C. Cir. 1995) (listing three factors courts consider when making "closely related" determination).

The few specifics in the first amended charge further demonstrate the lack of a significant relationship between the Vislisel allegation and charges. *See Lotus Suites, Inc. v. NLRB*, 32 F.3d 588, 591-92 (D.C. Cir. 1994). Nothing concerning Vislisel appears in the first amended charge, and both the first amended charge and April 16 amendment are devoid of any indication Vislisel, or the threat he allegedly made, "gr[ew] out of" charged allegations. *See NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959). Without showing the allegation against Vislisel and those in the first amended charge were "closely related," the Board could not exercise jurisdiction over the allegation, and enforcement on that matter should be denied. *See Drug Plastics*, 44 F.3d at 1022.

Even if the Board had jurisdiction, Vislisel's remarks can be read, at most, as a truthful statement that one potential consequence of a strike is job loss. The statement is not actionable, because it was "phrased on the basis of objective fact to convey [the employer's] belief as to demonstrably probable consequences beyond [its] control." *Int'l Union, UAW v. NLRB*, 520 F.3d 192, 195, 196 (2d Cir. 2008) (quoting *Gissel Packing*, 395 U.S. at 618); *see Laborers' Dist. Council v. NLRB*, 501 F.2d 868, 875 (D.C. Cir. 1974) (employer's statements, including a reference to "the possibility of a strike," were factually accurate and conveyed employer's reasonable belief, so were protected speech).

IV. The Board's finding that Ingredion did not reasonably respond to the Union's information requests is not supported by substantial evidence.

Employers must timely respond to a union's information requests relevant to the Union's role as bargaining representative. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). In evaluating the timeliness of a response, the Board considers the totality of the circumstances. *Spurlino Materials, LLC*, 353 N.L.R.B. 1198, 1200 (2009).

The Board found Ingredion violated section 8(a)(5) by delaying, from May 13 to July 31, 2015, in providing the Union with information regarding:

> (1) the total dollar cost and cents-per-hour for each fringe benefit during the period May 1, 2014, through May 1, 2015, including [Ingredion's] accounting method for the cost-per-hour basis for each benefit;
>
> (2) the cents-per-hour individual cost for each dollar increase to the pension multiplier; and
>
> (3) the cents-per-hour for individual cost for each 1 percent increase in the direct contribution plan.

D.A.2186 n.1, 2207-08.

Substantial evidence does not support the Board's decision. The record shows Ingredion made a "reasonable good-faith effort to respond to the request as promptly as circumstances allow[ed]." *Good Life Beverage Co.*, 312 N.L.R.B. 1060, 1062 n.9 (1993).

IV.A. Ingredion produced substantial amounts of information in response to the Union's requests.

Before negotiations began, Ingredion provided a "substantial amount" of material. D.A.2207. On May 13, 2015, the Union asked Ingredion for 12 categories of information, including the items at issue. D.A.2099, 2207. Several employees immediately worked to gather the documents. D.A.1796; D.A.1970, 1972 (Tr. 162-64, 191). Ingredion produced responsive documents for nine of the categories before negotiations began. D.A.2207; D.A.519-540 (Jt.Ex. 18).

Ingredion was not in possession of information responsive to the items at issue; third parties held that information. Although acquiring such information would be expensive, and Ingredion would not be able to produce the information in "a timely fashion," D.A.2207, Ingredion sought the information anyway. *E.g.*, D.A.1972, 1991-92, 2062 (Tr. 191-92, 414-15, 968-69).

Ingredion heard nothing from the Union about its responses to the May 13 request until June 29, 2015 (a month into bargaining), when the Union asked for additional information and repeated its request for the items at issue. D.A.1770. That same day, Ingredion responded to the June 29 request. *See* D.A.542-45. As part of its response, Ingredion answered the request regarding the total cost per hour for fringe

benefits and provided insurance rates for hourly employees. D.A.2063 (Tr. 973-74); D.A.2207. Meadows explained that third parties possessed some responsive information, that Ingredion had reached out to the third parties, and that it could take until October 2015 before Ingredion received a response. D.A.542-45, 1678; D.A.1972, 1991-92, 2062 (Tr. 191-92, 414-15, 967-68).

On July 14, the Union submitted another request, seeking five categories of information. D.A.549. None of the items at issue was in the July 14 request. *See* D.A.1770, 1796. Ingredion answered the request a few days later. D.A.551-54, 2207; D.A.2065-66 (Tr. 982-83).

The Union issued another information request on July 28, seeking 55 distinct categories (with 35 sub-categories) of information. D.A.556-62. Ingredion responded to the request that night, giving the Union over 500 pages of documents. D.A.2000, 2069 (Tr. 447-48, 995); D.A.563-1109 (Jt.Exs. 24-25). The items at issue were not part of the July 28 request. *See* D.A.556-62.

The Union's subsequent July 30 request was a "much larger" request and reiterated its previous requests, including the items at issue. D.A.1111-12, 2207. Meadows reminded the Union that Ingredion had already produced some of the responsive information and that it did not have certain information, but had requested it from third parties. D.A.2062, 2075 (Tr. 968, 1020-21). Regardless, Ingredion produced over 500 pages of materials the following day. D.A.1113-1623 (Jt.Exs. 27-28); D.A.1832; D.A.2075 (Tr. 1022).

IV.B. Ingredion made a good-faith effort to respond to the Union's information requests.

Substantial evidence does not support the conclusion that Ingredion unreasonably delayed in responding to the Union's information requests. That Ingredion "took immediate action to get the requested information," instead, demonstrates its good-faith effort, as does the fact that Ingredion tasked several employees with responding to the Union's requests. *See Spurlino Materials*, 353 N.L.R.B. at 1200; *Union Carbide Corp.*, 275 N.L.R.B. 197, 200-01 (1985). Upon receiving the comprehensive requests, Ingredion "busted bones" to respond, often answering a request the day it was made. *See* D.A.2069 (Tr. 995); *see also* D.A.1972 (Tr. 191); D.A.542-45. In all, Ingredion produced over 1,000 pages of documents. *See* D.A.518-547, 550-554, 563-1109, 1113-1623 (Jt.Exs. 18-20, 22, 24-25, 27-28).

Because third parties possessed some of the requested information, Ingredion was required to make a good-faith effort to secure that information and explain to the Union the reasons for its unavailability. *See*, *e.g.*, *Pittston Coal Grp.*, 334 N.L.R.B. 690, 692-93 & n.19 (2001). Contrary to the findings of the ALJ, Ingredion did just that.

The ALJ determined Ingredion had not shown that information responsive to the requests at issue was "difficult to retrieve" and "gave no explanation for the delay in providing" such information. D.A.2208. But testimony the ALJ referenced, D.A.2207, showed that acquiring the information would be expensive and "time-consuming." *See Union Carbide*, 275 N.L.R.B. at 200-01 (ten-month delay not unreasonable on similar

facts). Although Meadows doubted the relevance of several information requests, he never refused to respond or "deliberately slowed down [Ingredion's] preparation of the information." *See Albertson's, Inc.*, 351 N.L.R.B. 254, 279 (2007) (nine-month delay not unreasonable on similar facts). Rather, Ingredion responded quickly to requests, and Meadows told the Union that Ingredion did not have all responsive information, that it had asked third parties for the information, and that it would take several months before it received the information. D.A.2062, 2075 (Tr. 968, 1020-21).

Under these circumstances, there was no section 8(a)(5) violation.

V. The Board violated Ingredion's due process rights by considering new allegations raised immediately before and during trial.

A complaint may be amended "any time prior to the issuance of an order based thereon," if the amendment comports with "fundamental principles of fairness" inherent in due process. *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23 (D.C. Cir. 2015). Due process arguments are reviewed de novo, but when an employer is deprived of "notice and the opportunity to fairly litigate its liability," reversal is necessary when "there is even a chance that the company could have successfully defended against the charge." *Id.* at 22, 24. The General Counsel's April 16 amendment, and an argument it made for the first time on April 21, 2016, the fourth day of trial, did not meet these basic requirements.

Even if this Court concludes that it may address the ALJ's finding regarding the allegation against Vislisel, *see supra* Section III.B., enforcement must be denied, because

the April 16 amendment violated due process. After amending its complaint previously, the General Counsel modified the complaint again on Saturday, April 16, 2016, just two days before trial, adding the allegation regarding Vislisel and claiming Ingredion had engaged in surface bargaining by "undermining and denigrating the Union" when it misrepresented its bargaining position. D.A.1659-62. Over Ingredion's objection, D.A.1955 (Tr. 12), the ALJ allowed the amendment and found that Vislisel had threatened employees and that Ingredion had denigrated the Union, and the Board explicitly adopted the latter finding. D.A.2186-87 & n.1, 2206, 2221.

Giving Ingredion only two days to prepare a response to the April 16 amendment, however, does not constitute adequate notice sufficient to ensure Ingredion had a "meaningful opportunity to meet the complaint." *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 548 (6th Cir. 1984) (due process violated when company had only a weekend to prepare); *Russell-Newman Mfg. Co. v. NLRB*, 370 F.2d 980, 984 (5th Cir. 1966) (similar). The General Counsel took advantage of Ingredion's inability to prepare, soliciting testimony from Bishop about issues raised in the amendment on the first day of trial. *E.g.*, D.A.1957-59 (Tr. 37-38, 50). That testimony served as the sole support for the ALJ's finding regarding Vislisel. D.A.2206. Although Ingredion cross-examined Bishop, due process isn't satisfied by a "mere opportunity to question witnesses without a prior opportunity to prepare a meaningful defense." *NLRB v. Complas Indus., Inc.*, 714 F.2d 729, 734 (7th Cir. 1983).

The argument the General Counsel made on April 21, 2016, violated the "well settled" principle "that an agency may not change theories in midstream without giving respondents reasonable notice." *Id.* (quoting *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)). On April 21—the fourth and final day of the General Counsel's case in chief—the General Counsel contended for the first time that any discipline "flow[ing]" from Ingredion's alleged unilateral implementation of its best and final offer must be rescinded. D.A.2031-32 (Tr. 681-85). Ingredion again objected, D.A.2032-33 (Tr. 685-88), but the ALJ allowed the General Counsel to proceed, and the Board granted the relief the General Counsel sought, D.A.2186-88, 2221-22.

By April 21, most of the General Counsel's witnesses had already testified, leaving Ingredion unable to question them about the new theory. *See Bruce Packing*, 795 F.3d at 23; *Drug Package, Inc. v. NLRB*, 570 F.2d 1340, 1345 (8th Cir. 1978) (remedies issue was not fully and fairly litigated, "[a]lthough the underlying facts were," because employer may have litigated the matter differently if it had known such penalties were a possibility). The total "lack of notice" regarding the April 21 argument "precluded full and fair litigation." *Eagle Express Co.*, 273 N.L.R.B. 501, 503 (1984); *see Ne. Ind. Bldg. & Constr. Trades Council v. NLRB*, 352 F.2d 696, 698-99 (D.C. Cir. 1965) (rejecting Board finding that a violation had occurred on grounds not alleged in the complaint).

That the General Counsel never moved to amend the complaint to include the April 21 argument, as Board regulations require for mid-hearing amendments, further

supports the conclusion it violated Ingredion's due process rights. *See* 29 C.F.R. §102.17; *Piggly Wiggly Midwest, LLC*, 357 N.L.R.B. 2344, 2345 (2012).

In contrast to Ingredion, the General Counsel "had months" to prepare. *See Homemaker Shops*, 724 F.2d at 548. The events on which the April 16 amendment and April 21 argument were based occurred in or before September 2015, over eight months before trial. Rather than assert the allegations in its original complaint (filed January 28, 2016) or first amendment (filed March 8, 2016), the General Counsel waited until trial. D.A.1632-42, 1651-54. This conduct deprived Ingredion of "freedom from surprise and an ample opportunity to defend" itself. *See Complas Indus.*, 714 F.2d at 734. Enforcement of the Board's order with respect to these untimely allegations therefore should be denied.

VI. The Court should not enforce the Board's notice-reading remedy.

As a remedy, the Board ordered now-retired Ingredion employee Meadows, or a Board agent in Meadows's presence, to read a notice to employees. D.A.2186 n.2, 2188. If the Court agrees that Ingredion did not violate the Act, it obviously need not consider whether the remedy was proper. But even if it considers the issue, the Court should vacate the Board's extraordinary notice-reading remedy, because Ingredion did not engage in the "numerous, pervasive, and outrageous" unfair labor practices necessary to affirm that remedy. *E.g.*, *Fallbrook Hosp. Corp.*, 360 N.L.R.B. 644, 657-58 (2014); *First Legal Support Servs., LLC*, 342 N.L.R.B. 350, 350 n.6 (2004).

Unlike cases where employers violated court orders and violated the Act for years, Ingredion has no such history. *See Fallbrook*, 360 N.L.R.B. at 657-58 (rejecting notice reading, in part, because employer had no history of violations); *see also Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 75-77, 86-87 (D.C. Cir. 2018) (upholding notice reading where employer had committed "multiple serious" violations over eight-year period). Nothing suggests Ingredion engaged in widespread or egregious unfair labor practices, such as retaliatory firings, discipline, withholding of benefits, or multiple threats of plant closure or decreased benefits. *See*, *e.g.*, *Teamsters Local 115 v. NLRB*, 640 F.2d 392-93, 394, 403-04 (D.C. Cir. 1981) (rejecting notice-reading remedy against a company president who had engaged in one violation); *A & G, Inc.*, 351 N.L.R.B. 1287, 1302-03 (2007) (rejecting notice reading even though employer had unlawfully discharged, threatened, and surveilled employees). In the absence of such extreme conduct, traditional remedies—like distributing and posting a notice to employees, which the Board also ordered here, D.A.2186, 2188, 2222—are sufficient. D.A.2186 n.2; *see, e.g.*, *First Legal Support,* 342 N.L.R.B. at 350 n.6. Mandating Meadows's appearance at the notice reading, when he no longer works for Ingredion, is inconsistent with the "remedial" nature of the NLRA. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940).

This case thus simply does not present the "outrageous" conduct necessary to enforce this "rarely-used" remedy. *Conair Corp. v. NLRB*, 721 F.2d 1355, 1385-87 (D.C. Cir. 1983).

CONCLUSION

Enforcement of the Board's order should be denied.

APRIL 2, 2019

Respectfully submitted,

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APRIL 2, 2019 /s/ Brian J. Paul

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I hereby certify that on April 2, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, including:

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